

J. Cohen
Proc II

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DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: R-186794

DATE: November 11, 1976

MATTER OF: S&Q Corporation

DIGEST:

1. Telegraphic bid modification received at Base Exchange Western Union Office before bid opening but not received by procurement officials until after bid opening was late and may not be considered, since delay in delivery may not be attributed solely to Government mishandling after receipt as Base Exchange Western Union office is not part of Government installation. 50 Comp. Gen. 76 (1970).
2. While Government mishandling in process of receipt of, as opposed to after receipt of, telegraphic bid or modification may provide basis for consideration of an otherwise late bid or modification, that principle is not applicable where, as here, Government mishandling was not paramount in failure of modification to be received at Government installation prior to bid opening.

Invitation for bids (IFB) No. F41615-76-09033 was issued on February 23, 1976, by the Department of the Air Force for construction of a computerized central surveillance and control system, energy conservation program and fire alarm system for Lackland Air Force Base, Texas. Paragraph 5(d) of Standard Form (SF) 22, "INSTRUCTIONS TO BIDDERS," provided for consideration of telegraphic bid modifications. Paragraph 7 of SF 22 set forth the language of Armed Services Procurement Regulation (ASPR) § 7-2002.2 (1975 ed.) in part as follows:

"LATE BIDS, MODIFICATIONS OF BIDS OR WITHDRAWAL
OF BIDS * * *

"(a) Any bid received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made and * * *

* * * * *

"(ii) it was sent by mail (or telegram if authorized) and it is determined by the

Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation.

"(b) Any modification or withdrawal of bid is subject to the same conditions as in (a) above * * *."

Bids were opened as scheduled at 2 p.m. on June 8, and Honeywell, Inc., was the low bidder. The other bidders included S&Q Corporation (S&Q). At approximately 2:45 p.m. the procurement office received a telephone call from an employee at the Western Union office located at Lackland Air Force Base, who stated that she had received a telegram from S&Q. The telegram was picked up at 3:45 p.m. by the Buyer, who noted that it was a telegraphic modification of S&Q's bid, which if acceptable would cause S&Q to displace Honeywell, Inc., as low bidder. However, on the basis of paragraphs 5(d) and 7 of SF 22, and in view of the decision of this Office at 50 Comp. Gen. 76 (1970), it was determined that S&Q's telegraphic modification was late for reasons other than Government mishandling after receipt at the Government installation and could not, therefore, be considered.

At S&Q's request the contracting officer provided S&Q until June 22 to furnish information supporting the claim that the telegraphic bid modification should be considered. When no communication was received from S&Q by the close of business on June 22, award was made to Honeywell, Inc. By letter filed in this Office on June 22, S&Q protested the Air Force actions.

The record discloses that on Friday, June 4, S&Q notified the Buyer that it might wish to send a telegraphic bid modification. S&Q was informed that telegraph service to the Base tended to be "slow," and that it would be advisable to verify receipt of any telegram with the procurement office. In this connection, the Base Exchange Western Union office procedure is, upon receipt of a telegram, to call the addressee, who will then send a messenger to pick up the telegram.

S&Q delivered its bid modification to the Western Union office in San Francisco at 3:30 p.m. on June 7. As submitted, it contained the bid opening time and the Buyer's name and telephone number, to which the solicitation directed inquiries from prospective bidders. The telegram was received at the Base Exchange Western Union office at 5:47 p.m. on June 7. As received, it did not contain the Buyer's telephone number. Shortly after receipt, the Exchange employee at the

B-186794

Western Union office, Ms. Siggers, telephoned the procurement office, but received no answer. In this regard, the contracting officer states that the Buyer was in his office at that time and had his telephone number, which was included in the telegram as submitted to the San Francisco Western Union office, been called, he would have answered.

On the following day, Ms. Siggers attempted to reach the procurement office by telephone three times between 1 p.m., when the Base Exchange Western Union office opened, and 2 p.m., bid opening time, but received a busy signal each time. She finally reached the procurement office at 2:10 p.m., and the employee that answered the telephone referred her to the Buyer's telephone number. The Buyer was reached at 2:45 p.m., and picked up the telegram 1 hour later.

The protester submits the following arguments in urging that its telegraphic bid modification should have been considered:

- 1) "The procuring installation failed to establish or use reasonable procedures calculated to permit timely receipt of telegraphic bid modifications; as a result, S&Q's bid modification was 'mishandled' within the meaning of the regulation";
- 2) "Decisions of the Comptroller General support * * * [the above] result";
- 3) "The decision of the Comptroller General in * * * 50 Comp. Gen. 76 (1970) does not retain continuing vitality * * * and is in any event distinguishable."

In regard to S&Q's first two arguments, as stated above, the IFB provided that a late telegraphic bid modification could be considered only if the late receipt was caused solely by Government mishandling, after receipt at the Government installation. It is the reasonableness of delivery procedures within an installation after receipt by the Government that is for consideration by our Office when confronted with the issue of Government mishandling of a bid. See Stack-On Products Co.; Ontarioville Metal Products, B-181862, October 22, 1974, 74-2 CPD 220. As discussed below, receipt at a Base Exchange Western Union office by an Exchange employee is not receipt at the Government installation for purposes of determining the reasonableness of subsequent delivery procedures and whether there was Government mishandling.

B-186794

Concerning S&Q's third argument, in 50 Comp. Gen. 76 (1970) we considered circumstances very much like those here. In that case, bid opening had been scheduled for 3:30 p.m. on May 4, 1970. A telegraphic modification sent by the third low bidder reducing its bid arrived at the Nellis Air Force Base Exchange Annex, which operated a Western Union station, at 12:35 p.m. on bid opening day. The Base Exchange employees in the telegraph office attempted to notify the procurement office by telephone three times within the next 3 hours and 10 minutes of receipt of the telegram, but the procurement office telephone line was busy on each occasion. Essentially the same provisions of ASPR pertinent to S&Q's bid modification were applicable in that case. We stated:

"The * * * regulations and articles [of the 'Instructions to Bidders'] read together are interpreted by us as providing that a late telegraphic bid modification is for consideration when the telegraphic modification arrives at the Government installation before bid opening and the failure to arrive on time at the office designated in the invitation is due to mishandling on the part of the Government in its transmittal to the office designated in the invitation for bids. In that regard, ASPR 2-303 precludes consideration of late telegraphic bids or modifications when the delay is caused by the telegraph company.

"In view of the foregoing, the basic question is whether the late delivery of the telegram was attributable to delay by Western Union or to mishandling 'on the part of the Government.' We recognize that post exchanges and nonappropriated fund activities have been held to be instrumentalities of the United States for some purposes (Standard Oil Company of California v. Johnson, Treasurer of California, 316 U.S. 481 (1942); United States v. Holcombe, 277 F.2d 143 (1960); Elm Spring Farm, Inc. et al. v. United States, 127 F.2d 920 (1942); United States v. Howell, 318 F.2d 162 (1963)), but we do not believe that the principle of those decisions is applicable here. The contract between the Western Union Telegraph Company and the Nellis Air Force Base Exchange stipulates that the agreement stemmed from Western Union's desire to furnish the necessary services in connection with telegrams, etc. Also, it is specifically provided in the contract that the Exchange is to 'act as the agent' for Western Union at the Base, and we think it reasonably follows that exchange employees likewise are agents of Western Union.

B-186794

For these reasons we think that the telegraph office in question is a Western Union office notwithstanding its location in a base exchange and its operation by exchange employees."

We therefore concluded that the delay was attributable to the telegraph company, not the Government, and the late telegraphic modification could not be considered.

In the present case, as in the 1970 situation, the contract between Western Union and the Government provides that Western Union is to furnish various telegraphic services, and that the Base Exchange "will act as agent for Western Union." In addition, the Lackland Air Force Base Exchange Western Union office is also operated by Exchange employees. Although the current regulations do not contain the provision precluding consideration of late telegraphic modifications when the delay is caused by the telegraph company, this distinction is not significant since we have held under the present regulations that a telegraphic bid modification was not for consideration where Western Union was the substantial cause for its nonreceipt at the Government installation until after bid opening. Record Electric Inc., B-186848, October 6, 1976, 56 Comp. Gen. _____. Thus, if 50 Comp. Gen. 76 (1970) is otherwise controlling, S&Q's protest must be denied.

S&Q bases its contention that the 1970 decision "does not retain continuing vitality" on its belief that "* * * the Comptroller General has since 1975 altered his approach to and philosophy concerning late bid modifications." S&Q in part cites the following from our decision in Hydro Fitting Mfg. Corp., 54 Comp. Gen. 1000 (1975), 75-1 CPD 331, in which we considered the effect of the regulations regarding late telegraphic bids where the Government's failure to transcribe a timely telegraphic bid due to the malfunction of a Government telex machine, operated by Government personnel, resulted in a lack of requisite acceptable evidence of timely receipt, and in the physical telegraphic bid being received after bid opening:

"* * * That mishandling by the Government occurred here is, we believe, clear. But, in our view, the regulation contemplates, and our decisions thereon have involved, instances where a tangible bid was mishandled after physical receipt.

"While this may be the case, we believe that strict and literal application of the regulation should not be utilized to reject a bid where to do so would contravene

the intent and spirit of the late bid regulation. The regulation insures that late bids will not be considered if there exists any possibility that the late bidder would gain an unfair advantage over other bidders. In addition, ' * * * The purpose of the rules governing consideration of late bids is to insure for the Government the benefits of the maximum of legitimate competition, not to give one bidder a wholly unmerited advantage over another by over-technical application of the rules.' 42 Comp. Gen. 508, 514 (1963); and B-157176, August 30, 1965. This belief is particularly proper here because, in our view, the current regulation did not contemplate the instant circumstances, i.e., mishandling in the transcription of a telegraphic bid and the resultant failure of a Government installation to have actual control over the bid or evidence of time of receipt."

However, in that decision we discussed the purpose of the regulations regarding receipt of late telegraphic bids only because, as stated in the last sentence quoted above, the regulations themselves were not directly applicable. The 1975 decision does not, therefore, indicate a change in "approach" or "philosophy" concerning consideration of late bid modifications where the regulations dictate a clear result. See also Dynamic International Inc., B-183718, July 28, 1975, 75-2 CPD 61; compare I&E Construction Company Incorporated, B-186766, August 9, 1976, 55 Comp. Gen. _____, 76-2 CPD 139. In this regard, as noted above, ASPR § 7-2002.2 (1975 ed.) provides that any telegraphic bid modification received at the office designated in the solicitation after the exact time specified will not be considered unless it is received before award and the late receipt was due to mishandling by the Government after receipt at the Government installation. Since the Base Exchange Western Union office is not part of the Government installation (50 Comp. Gen. 76, supra), and the telegraphic modification was not received at the installation (the procurement office) until after bid opening, the exception concerning mishandling is not for application.

While we have recognized that Government mishandling in the process of the receipt of, as opposed to after the receipt of, a telegraphic bid or modification may provide a basis for consideration of an otherwise late bid or modification (Hydro Fitting Mfg. Corp., I&E Construction Company, Incorporated and Record Electric Inc., supra), that principle is not applicable where, as here, Government mishandling was not paramount in the failure of the modification to be received at the Government installation prior to bid opening. (Record Electric Inc., supra).

S&Q attempts to distinguish 50 Comp. Gen. 76 (1970) on the following grounds:

"(1) Here, the IFB barred special delivery submissions and specifically authorized telegraphic bid modification. In the 1970 opinion bidders presumably had a choice how to accomplish bid changes. * * *

"(2) In the 1970 case ' * * * the Western Union operator did not reach an untended office on the afternoon prior to the bid opening date.'

* * * * *

"(3) The person answering the telephone at the Procurement Office [at 2:10 p.m.] had not been forewarned by the Contracting Officer; he was unprepared to respond or to salvage the situation for the bidder or for the Government. As a result, although the telephone communication arrived probably in time--that is, no later than the middle period of the twenty-minute bid-opening session (and probably during the beginning of that formality)--it proved unavailing. The communication resulted in nothing more than a suggestion by the Procurement Office that another number be called.

"No such occurrence is recorded in the 1970 opinion.

"(4) Here, there was no assurance that if S&Q had sent a telegraphic bid modification at any time Monday afternoon, June 7, that communication would have reached the procuring activity by 2:00 p.m. on Tuesday, June 8. * * *

"(5) Here, Mr. Spence [the Buyer] discussed telegraphic bid modification on Friday, June 4, with the contractor's representative. But although Mr. Spence mentioned that service through Western Union was slow, he did not warn that telegrams would have to be sent no later than the morning of June 7 if they were to have a reasonably good chance of being received by 2:00 P.M. on Tuesday. Having given the contractor some information concerning telegraphic bid modifications, the authorized staff official should have provided the remainder of the relevant information. If extraordinary action were necessary to get telegraphic bid modifications through, the staff of the Contracting official should have told bidders the entire story and not just a narrow portion of it.

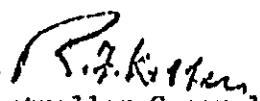
B-186794

"In the 1970 opinion no such prior conversation took place with bidders concerning difficulties which might be encountered in getting communications through from the Western Union Post Exchange facility to the Procurement Office."

In addition, S&Q argues that the Lackland Air Force Base Exchange should be considered an agent of the Air Force for purposes of receipt of telegraphic bid communications.

We are not persuaded that 50 Comp. Gen. 76 (1970) is distinguishable from the present situation. Concerning S&Q's first point, the present IFB did provide for mailed or hand-delivered bid modifications as alternatives to telegraphic ones. In regard to its remaining four arguments, the two factual patterns are almost identical in all material respects relevant to the issue of whether the telegraphic bid modifications were mishandled by the Government. Moreover, we cannot agree that the caution given S&Q by the Buyer on June 4 concerning slow Western Union service on the Base, and the advice as to action S&Q might consider to verify timely receipt of any telegram, in any way decreased the bidder's responsibility to ensure that its bid modification was received by the Air Force before bid opening; to the contrary, such notice may be viewed as increasing that responsibility. Finally, regarding the contention that, for present purposes, the Exchange (and presumably its employees) should be considered an agent of the Government, we see no reason to alter our view as expressed in 1970 that, in view of the contractual provisions involved (and discussed above), the activities of a Western Union office located on a base exchange and operated by exchange employees cannot be considered actions of the Federal Government in the context of the issue of Government mishandling of a telegraphic bid modification.

Accordingly, and on the basis of our holding at 50 Comp. Gen. 76 (1970), the late receipt of S&Q's telegraphic bid modification may not be attributed solely to Government mishandling and, in accordance with ASPR § 7-2002.2 (1975 ed.), could not be considered. In view thereof, the protest is denied.


Deputy Comptroller General
of the United States